

VZCZCXYZ0008
OO RUEHWEB

DE RUEHNR #1658/01 2121003
ZNY CCCCC ZZH
O 311003Z JUL 09
FM AMEMBASSY NAIROBI
TO SECSTATE WASHDC IMMEDIATE 0575

C O N F I D E N T I A L NAIROBI 001658

SIPDIS

For AF A/S Carson and NSC Gavin from the Ambassador
E.O. 12958: DECL: 07/31/2019
TAGS: [PGOV](#) [PREL](#) [KDEM](#) [KJUS](#) [PHUM](#) [KE](#)
SUBJECT: Coalition Government Still Punting on Special Tribunal

Classified By: Ambassador Michael E. Ranneberger for reasons 1.4 (B and D)

¶1. (C) Summary: On July 30 President Kibaki issued a statement which once again failed to take a forthright and credible position with respect to accountability for post-election violence. Although the statement does not preclude establishment of a Special Tribunal (and specifically indicates the government will cooperate with the International Criminal Court), overall it appears to indicate a circling of the wagons around a least common denominator position that reflects continued delay and little will to challenge the culture of impunity. Given the ambiguity of the statement, we do not plan immediate comment, but depending on further developments it may be useful once again to make clear the U.S. position prior to the Secretary's arrival. End summary.

¶2. (C) On July 30 President Kibaki read a statement regarding the issue of accountability for post-election violence following another prolonged discussion of this contentious subject by the Cabinet. Initial reports indicated that the government had decided to reject formation of an independent Special Tribunal and to reject the International Criminal Court option, and had opted instead for establishment of a special court within the Kenyan judicial system. However, this did not happen. The statement (text in para 11) instead essentially punts on these issues, without taking a clear position, and is troubling in several respects, particularly given statements Kibaki and others separately made to the media.

¶3. (C) Apart from the statement, the Kenyan media quoted Kibaki as saying: "They (suspects) will be tried locally. We are not saying anything about a special tribunal. We are able to try anybody and the laws are there." This statement appears to reflect an approach which has been mooted by the Minister of Justice and others that the government may decide to set up a tribunal within the existing justice system - an approach which would not be credible. One minister who participated in the Cabinet discussions told the media that "there is no Special Tribunal and there is no Hague." Commenting on the Cabinet discussions, Prime Minister Odinga told the media that: "We were faced with a hostile Parliament and a judiciary many Kenyans have no faith in. It would be pointless to start trials under the current situation."

¶4. (C) Comment: Parliament has consistently indicated it would not be willing to enact a law to establish a Special Tribunal. In addition, real reform of the police and judiciary, although referred to by President Kibaki in his statement, will take some time to implement even if there was the political will to support it. The Attorney General and Chief Justice have both blocked action on politically sensitive cases in the past, and are expected to continue to do so. End Comment.

¶5. (C) Although there are a couple of positive elements in the statement, overall it and the comments made to the media are troubling. On the one hand, the statement says that the government will cooperate with the ICC and will carry out accelerated reforms in the judiciary and police. On the other hand, the statement indicates that the Truth, Justice, and Reconciliation Commission (TJRC) will be amended to expand its role perhaps, as has been mooted, to give the TJRC a greater role in dealing with accountability for post-election violence - which would not be a credible approach. We understand that what is being discussed to deal with the accountability issue is a homegrown approach linking expansion of the TJRC mandate with the setting up of a local tribunal under the existing judicial system.

¶6. (C) The statement follows extensive contentious discussions by the

full Cabinet on the way forward regarding accountability. The statement is a reflection of the fact that the government has yet to decide on precisely what to do, but is feeling the pressure both from the international community (particularly the United States and the Panel of African Eminent Persons) and the Kenyan people to make clear its position and to act.

¶7. (C) Credible sources have told us that this statement was particularly prompted by the upcoming visit of Secretary Clinton. Fully aware of the pressure the United States has been exerting for action on reform and accountability, the coalition leadership felt the need to get at least something on record before her arrival.

¶8. (C) We do not plan to react immediately to this statement, given its ambiguity. We are working to determine what more may be behind it, and whether there may be more to follow which would spell out how the government sees the way forward. Civil society leaders have expressed concern that the statement reflects further delay and a troubling position on accountability, and they are working to develop a joint public position. Some reform-minded Members of Parliament are also expressing concern.

¶9. (C) In essence, the statement appears to be a holding action and reflects the fact that the coalition leadership has decided to circle the wagons with a least common denominator consensus approach. The Cabinet appears to be united behind the cause of protecting individual MPs from prosecution and avoiding any meaningful action on crimes related to post-election violence that could prejudice the political aspirations of the elite in 2012 and beyond. This appears to reflect once again a lack of will to challenge the culture of impunity.

¶10. (C) Depending on what more we learn about the government's position and related developments, it may be appropriate to comment publicly in order once again to make the U.S. position clear (regarding accountability and the reform agenda) prior to the Secretary's arrival. We will coordinate closely with you before taking any action.

¶11. (U) Begin text of Kibaki's statement:

Cabinet today discussed extensively and exhaustively the various options available to it in dealing with the crimes committed during post-election violence. The options were as follows:

- i) The Special Tribunal,
 - ii) Referral to the International Criminal Court (ICC) under Article 14 of the Rome Statute,
 - iii) Withdrawal from the Rome Statute under Article 127 and repeal of the International Crimes Act, 2008
 - iv) Using the High Court under Section 8 of the International Crimes Act, 2008,
 - v) Establishment of a Special High Court Division,
- Cabinet discussed each of these options extensively in terms of merits and demerits with regard to the legal and institutional considerations.

The Cabinet took all the circumstances into account, including providing the enabling environment for the ongoing reform agenda that encompasses the delivery of a new constitution by next year, electoral reforms, boundary reforms, and land reforms.

Cabinet was concerned that while it will not stand for impunity in the pursuit of justice, the country should equally pursue national healing and reconciliation. This does not in any way reduce its desire to punish impunity.

Therefore Cabinet resolved as follows:

- i) It reaffirmed its commitment to rule of law, and in particular its commitment to the international Criminal Court and will cooperate and fulfill its obligations to the Court under the Rome Statute;
- ii) It will undertake accelerated and far-reaching reforms in the judiciary, police, and investigative arms of Government to enable them to investigate, prosecute and try perpetrators of post-election violence locally;
- iii) It will deal with other forms of impunity including extra-judicial killings, corruption, and fraudulent or unlawful acquisition of public land and other public assets; and
- iv) It will propose amendments to the Truth Justice and Reconciliation Act that will make the TJRC more representative and effective.

Cabinet is confident that with proper healing and reconciliation, Kenya will not face the events of last year's post-election violence.

Cabinet remains fully committed to implementing the rest of the Agenda Four items where significant progress is currently being made. End text.

RANNEBERGER